

The Consensus Fights Back: European First Principles Against the Rule of Law Crisis (part 2)

VB verfassungsblog.de/the-consensus-fights-back-european-first-principles-against-the-rule-of-law-crisis-part-2/

Tomasz Tadeusz Koncewicz Do 5 Apr 2018

Do 5 Apr 2018

A Crumbling European Consensus ?

The politics of resentment call the original narrative built around the rule of law into question by proposing a competing one, that of fundamental disagreements over values and the inability of today's European Union to keep fostering mutual trust. The politics of resentment poses an existential threat to the consensus because the commonality of values and interests is replaced with unbridgeable difference. The values that brought together the parties to the consensus are now given distinctively national interpretation without regard to others and the EU legal system. An argument is made that the concept of common values is too ephemeral and far from crystalized. Given the fundamental and persistent disagreements over basic (not just any) values that the politics of resentment bring to the fore, the pressing question is whether "we" exist at all. With different conceptions of the rule of law (no independent judiciary, checks and balances and judicial review) and human rights, the consensus is coming apart at the seams. These concepts were thought of as the basic minimum that all the parties to the consensus agreed to respect when they decided to join. The consensus loses its discursive value when Poland rejects bargaining and, rather than "voicing" its concerns within the pre-agreed framework that consensus offers, choses to "exit" unilaterally.

We should be clear about the kind of challenges the European consensus is facing right now. With the politics of resentment on the rise, „the European consensus” might be just minutes away from a most fundamental challenge of *“mega-politics”* of identity and self-survival. Why? The „overlapping consensus” recognized that the European polity is composed of distinct peoples and respects other peoples' ways of lives. Yet, for a consensus to work, „we” the European peoples' should acknowledge certain fundamentals that bind and discipline us and that brought us together. Part of the deal behind the overlapping consensus has always been the acknowledgment that parties are ready to enter into a bargaining process in order to find similar grounds of understanding of the fundamental commitments. Bargaining presupposes managing the disagreement over time in order to build a common understanding of the basic principles.

However, parties with unreasonable and irrational doctrines that question the liberal democracy as a form of government must be excluded from the consensus. This is so because the disagreement must not undermine all parties' commitment to support liberal democratic principles under a democratic constitutional regime. The emerging constitutional doctrine of the politics of resentment is anything but reasonable and rational within the meaning of the consensus that brought parties together. Resentment-driven constitutional capture in Poland undermines the very idea of Europe, together with the principles of liberalism, tolerance, 'living together', and 'never again constitutionalism'. It replaces these founding principles with zero-sum politics, a vision of 'us vs. them' and a competing

constitutional narrative of fundamental disagreement over values. It proclaims that “we, the European peoples” are not ready to live together in one pluralistic constitutional regime. It becomes clear that the politics of resentment backed up by capture not only challenges the standard story of the origin of the EU – that it was founded to bring peace and prosperity to Europe by ending the possibility of war and encouraging the common rebuilding of economies – but also puts forward a new and competing constitutional project and design.

The Consensus in the Court-Room: Enforced or ... Lost

For the EU to have a chance against the rising politics of resentment, the language, and perspectives through which the EU looks at the member states, must be challenged and change. “*Essential characteristics of EU law*” (term used by the Court of Justice in its Opinion 2/13, para 167), must go today beyond traditional “*First Principles*” of supremacy and direct effect, to embrace the rule of law, separation of powers, independence of the judiciary and enforceability of these principles as part of the ever-evolving consensus. Together these essential characteristics of EU law have given rise to what the Court has imaginatively called: « *a structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other, which are now engaged, as is recalled in the second paragraph of Article 1 TEU, in a ‘process of creating an ever closer union among the peoples of Europe’* ». When it comes to fundamentals, there is no place for bargaining. „*First Principles*” (I borrow the term from Sir D. Edward’s *An Appeal to First Principles*; on file with the author) demand fidelity and action and call for reexamination in the light of a rebuttable presumption that values like rule of law are ... no longer shared.

When faced for the first time with the politics of resentment in the logging case, the Court, by imposing a penalty payment on Poland, not only defended itself in the spirit of judicial self-defence, but also spoke on behalf of the consensus and its cohesiveness. The Court we saw in the *Commission v Poland* was the „Court of old”; guardian of the „Community integrity” and effectiveness. Art. 2 TEU forms part of the EU law *senso largo* in the same way the Court has interpreted the term „law” in what once was called the most important legal provision of the Treaties (art. 220 of the former Treaty on the European Community, now art. 19 TEU). In the light of 50-year strong *acquis jurisprudentiel* there is still untapped remedial potential in art. 19 TEU („the law”, « *le droit* » « *des Rechts* », « *prawo* »). The First Court of 60’s and 70’s always spoke of the authority of the law that binds together the Union of “states, institutions and individuals”.

The rediscovery of these old precedents and building on the spirit of what former Judge of the Court C. Kakouris called „*the mission of the Court*”, might be happening in Luxembourg right now. „*The effective application of EU law as an essential component of the rule of law*” (C – 441/17R), the „*existence of effective judicial review as the essence of the rule of law*” (Case C – 72/15), „*the guarantee of judicial independence as inherent in the adjudication*” and a prerequisite for ensuring the effective judicial protection (Case C – 64/16), and now also „*mutual trust*” in the performance and status of the courts in the member states – parties to the consensus, are all essential elements of the „*European First Principles*”. Respect for the rule law and trust in law are existential components of the original consensus on which all other commitments of the parties are built. The moment

these principles start to crumble, so will the consensus. At long last, the politics of resentment faced a powerful enemy: European courts with their own fidelities and loyalties. From the way Poland has rejected the Court's order in the logging case and ridiculed the Court's judges, it is clear that the constitutional stakes could not be higher: survival and long-term viability of the consensus, the parties' continuing desire to belong to the consensus and to be bound by its First Principles.

With this, the time of „*mega-politics*” has indeed arrived ...

LICENSED UNDER CC BY NC ND

SUGGESTED CITATION Koncewicz, Tomasz Tadeusz: *The Consensus Fights Back: European First Principles Against the Rule of Law Crisis (part 2)*, *VerfBlog*, 2018/4/05, <https://verfassungsblog.de/the-consensus-fights-back-european-first-principles-against-the-rule-of-law-crisis-part-2/>.